ADMINISTRATIVE POLICY

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
EMPLOYMENT STANDARDS

TITLE: FREQUENTLY ASKED QUESTIONS ABOUT THE FAMILY CARE RULES

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WAC 296-130

SEE ALSO: ES.E.1

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In 1988, the Legislature established minimum standards for family leaves by passing Chapter 236, Laws of 1988 (Substitute House Bill 1319), which led to the original Family Care rules, Chapter 296-130 WAC. The Legislature recognized the changing nature of the work force and the competing demands on families brought about by increasing numbers of working mothers, single-parent households, and dual-career families. In addition, the Legislature recognized that it was in the public interest for employers to accommodate employees by providing reasonable leaves from work for family reasons. In order to promote family stability, economic security, and the public interest, the Legislature established minimum standards for family leave. During the 2002 legislative session, in presenting the bill to amend the original law, the legislative sponsors noted that both work and family trends had continued and intensified and that, in addition, our work force and our population are aging. More workers are in the “sandwich generation,” caring for aging parents along with their children, and many have spouses with a serious illness.

In January 1, 2003, the changes to RCW 49.12.265 through 49.12.295 took effect, allowing employees with available sick leave or other paid time off to care for sick family members in addition to sick children under age 18, as allowed under the original law. Under the new rules, employees may use paid leave to care for spouses, parents, parents-in-law, grandparents, and adult children with disabilities. Changes to the statute are a result of Chapter 243, Laws of 2002 (Substitute Senate Bill 6426), which was enacted in 2002. New rules were adopted and became

effective January 6, 2003. They expand the Family Care rules, Chapter 296-130 WAC, of 1988 and incorporate changes resulting from the new law.

Questions and answers about elements of the new rules

1. What is the scope of coverage under the new Family Care rules?
Under the new rules, employees in Washington State are entitled to use their choice of sick leave or other paid time off to care for a child with a health condition that requires treatment or supervision, or to care for a spouse, parent, parent-in-law, or grandparent who has a serious health condition or an emergency health condition, and to care for children 18 years and older with disabilities. Grandparents-in-law, grandchildren, and siblings are not included.

2. Are common-law or other domestic partners included under these new rules?
No. The law defines “spouse” as husband or wife. Washington State does not recognize common-law or same-sex marriages. Nothing in this law prohibits an employer from covering domestic partners, however.

3. Which employees are entitled to the provisions under these new rules?
All employees who have paid-leave benefits in Washington State are covered by these rules, regardless of size of employer.

4. How are the new Family Care rules different from the old ones?
The old rules allowed employees to use *accrued* sick leave to care for a sick child under the age of 18 years. The new rules allow employees to use available sick leave or other paid time off, including vacation time, to care for a sick child or other family members covered in the new law (spouse, parent, parent-in-law, grandparent). Unchanged from the previous rules, an employer is prohibited from discharging, demoting, or disciplining an employee for exercising their rights under the new law. Also unchanged from the previous law, violations of the family care provisions may result in a civil penalty.

5. In what situations can a worker take time off to care for a child?
A "child" according to the new law includes a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in for a parent. A parent may use available paid time off when their child has a “health condition” which includes:

- A medical condition requiring treatment or medication that the child cannot self-administer;
- A medical or mental-health condition which would endanger the child's safety or recovery without the presence of a parent or guardian; or
- A condition warranting treatment or preventive health care such as physical, dental, optical or immunization services, when a parent must be present to authorize the treatment.

6. Are conditions for attention deficit disorder (ADD) or other similar conditions included in the definition of “health condition” for a child under the age of 18?
Not necessarily. The definition of “health condition” did not change from the original Family Care rules in place since 1988. It is explicit about treatment and supervision for a medical condition or a mental-health condition that would endanger the safety of the child or their recovery from an illness. Behavioral disorders do not necessarily warrant such care unless there is also an illness or other reason for treatment for the child as listed above.

7. Under what circumstances is a parent of an adult son or daughter covered?
The scope of the rules includes children regardless of age, school attendance or marital status. If an adult son or daughter (i.e., 18 years of age or older) is "incapable of self-care because of a mental or physical disability … that limits one or more activities of daily living," then s/he is covered under this rule. The disability does not need to be a chronic condition to be covered. Traumatic injuries, surgery, illness, and some conditions relating to pregnancy may also cause a temporary disability for an individual. A disabling condition is one that prevents an individual from engaging in activities such as bathing, dressing, eating, cooking, shopping, or using public transportation without active assistance. Some individuals with a mental disability would be even more limited for other basic needs described in the rules.

8. In what situations can a worker take time off to care for a spouse, parent, parent-in-law, or grandparent?
An employee may use available paid time off when a spouse, parent, parent-in-law, or grandparent has a serious or emergency health condition:

- Requiring an overnight stay in a hospital or other medical-care facility;
- Resulting in a period of incapacity or treatment or recovery following inpatient care;
- Continuing treatment under the care of a health care services provider that includes any period of incapacity to work or attend to regular daily activities; or
- Emergency Health Condition – i.e., demanding immediate action.

9. Is care of a newborn covered under this new law?
No. The scope of the new rules covers care for a sick child or other family members specified in the law, not care for a healthy newborn. Healthy newborns do not require "medical" treatment. The federal Family and Medical Leave Act (FMLA) covers maternity and paternity leave for employers with 50 or more employees. (See more on Family Care and the FMLA beginning with Question 22.)

10. How do the Family Care rules affect new mothers?
The new rules do not address leave for a pregnant employee, but covers her spouse or parent who provide care as a result of any disability she may experience. Under Washington law addressed by the Human Rights Commission (Chapter 162-30-020 WAC) employers with eight or more employees must provide a woman a leave of absence for the period of time that she is sick or temporarily disabled due to pregnancy or childbirth; the length of time off is determined by the health care provider. The leave of absence may be paid or unpaid, according to the employer's policies.

New mothers covered by the FMLA are entitled to at least 12 weeks off during pregnancy and after childbirth. Those who work for larger employers (100 or more employees) are entitled to more, as described further in Question 22.

11. Will an employee be entitled to use sick leave to care for a spouse or child who is pregnant?
Yes. An employee will be entitled to use sick leave or other paid time off to care for a wife or daughter while she is incapacitated as a result of pregnancy or childbirth. This would generally include some prenatal and postpartum examinations, hospitalization, and recovery from childbirth.

12. Do the new rules require businesses to offer sick leave or provide longer periods of leave?
No. The rules simply assure that employees who do have sick leave or other paid time off are able to use this leave to care for sick family members, as specified by the law.

13. When must an employer allow an employee access to their sick leave or other paid leave to care for a sick family member?
If an employee already has access to paid leave, i.e., sick leave, vacation or holiday leave, for their own illness, under the new rules he or she must also have access to that same paid leave to care for a sick family member.

14. What is meant by "other paid time off?"
"Other paid time off," also known as "PTO," encompasses paid time allowed an employee for illness, vacation, or personal holiday. Under the new rules, workers will be able to use this all-purpose time to care for sick family members. For those employers who use an extended illness leave bank also sometimes known as an EIB (Extended Illness Bank), if it is a continuation of the normal sick leave policy it must also be available for an employee's use to care for family members specified in these rules. As stated in the rules WAC 296-130-030(2), "Many employers combine paid leave categories such as sick leave and vacation leave, often described as 'paid time off' or PTO. Such PTO allows employees the choice as to their use of this leave, thereby maintaining the intent of this chapter. In addition, employers may require employees to use PTO (provided it may be used for any purpose) as a prerequisite to using leave designated for a specific purpose, such as an extended-illness leave, without violating this chapter, provided other leave is available for employees to use to care for sick family members on the same terms that it is available for an employee's health condition." This means that extended illness banks must also be available for employees to use to care for a sick family member.

15. Are disability plans covered under the new rules?
No. Any employer plan or policy governed under ERISA, the Employee Retirement Income Security Act, is not covered under the new rules. Further, certain other short-term disability plans or policies may also be excluded. For example, employers may self-fund a plan which provides for the continuing payment of all or a part of an employee's wages during periods when the employee is on leave due to a prolonged illness or disability. Such plans also often require a waiting period before an employee may access benefits and provide benefits for a specified period of time. These plans do not usually begin until traditional sick leave is exhausted. The department considers this type of disability leave, which differs from an employee's normal sick leave or paid time off, to be akin to the benefits provided in commercially available disability plans. This type of disability plan or policy is not covered under the new rules since such plans only cover the employee's own illness. An employee must still be allowed to access any available sick leave or other paid time off to care for a sick family member specified in the new rules. Renaming a current sick leave plan as a disability plan or policy violates the intention of the rules.

16. What is meant by leave that is earned?
Earned leave is equivalent to a leave benefit that is available for an employee's use at the time that it is taken. In the new law, "earned" is not equivalent to accrued. The term "accrued" was removed from the original rule since many employers no longer use an accrual system. In some settings, a defined leave benefit is applied at a specific point in time – for instance, at the beginning of a calendar or academic year. The term "earned" refers to the fact that employers do not have to allow their employees to take advances on their leave, as in borrowing from the next year's benefit.

17. What is meant by the provision that says the employer must allow an employee to use any and all of the employee's choice of sick leave or other paid time off to care for a sick family member?
Employees must have access to any available sick leave or other paid time off to care for a sick family member. If employees have access to paid leave for themselves, then they must have full access to any and all of this leave to care for a sick family member. This law directs the employer to allow employees the choice of available leave to care for a sick family member. Employers must now allow use of sick leave and other paid time off to care for a sick family member even if a pre-existing collective bargaining agreement or employer policy prohibited such use. However, provisions of collective bargaining agreements or employer policies regarding the accumulation of leave and other provisions concerning the use of leave, such as medical certification and advance scheduling of vacation may still be applied.

18. Can an employer apply attendance policies to the use of sick leave?
Nothing in the new rules prohibits an employer from applying its attendance policies. However, like the previous rules, Chapter 296-130-035 WAC state an employer must not discharge, threaten to discharge, demote and suspend, discipline or otherwise discriminate against an employee because the employee has exercised or attempted to exercise any right provided under RCW 49.12.270. The rules do not limit the discretion of the employer to establish and utilize attendance policies, provided they do not violate the law with regard to an employee's access to sick leave or other paid time off to care for a sick family member. While "attendance policies" and "sick leave policies" are often intertwined, under these rules employees are protected from punitive sick leave policies when taking leave to care for a sick family member specified in these rules. However, where there is an abuse of a sick leave policy (e.g., use of leave for inappropriate reasons), an employer's attendance policy may then be applied.

19. Is there any type of verification of illness allowed under this new rule?
Yes. This law does not restrict the employer's ability to require certification or verification of an illness or other health condition described in the new rules. However, there may be some restrictions as to medical confidentiality that limits what type information can be shared. Employers should seek clarification on this from other resources.

20. What are the penalties under these rules?
An employer found to have committed an infraction under RCW 49.12.270 and 49.12.275 may be assessed the maximum penalty of a fine of $200 for the first noncompliance violation. An employer that continues to violate the terms of the statute may be subject to a fine not to exceed $1,000 for each violation.

21. How do these rules affect state and other public employees?
State and other public employees must receive, at a minimum, the same benefits stated in these rules as for any other employee. State employees, for instance, already have a choice of any paid leave to care for sick family members. However, use of sick leave for purposes other than a serious health condition was limited to up to five days per occurrence when caring for certain relatives. This has now been changed to allow individuals to use any and all of their available leave time. Title 251 WAC, personnel rules for employees in higher education, and Title 356 WAC, personnel rules for other state employees, reflect changes based on the new rules, but have some minor variances. Individuals should consult with their human-resources manager for specific questions.

Questions and answers about other related state laws (Family Leave Act and Human Rights Commission) and the federal Family Medical and Leave Act)

22. How are these rules different from the state's Family Leave Act?
There has been confusion about the extended leave for disability allowed under the Family Leave Act (Chapter 49.78 RCW), originally passed in 1989. Since the Family Leave Act is almost completely superseded by the federal FMLA, in 1997 the Legislature directed the Department of Labor and Industries (L&I) to cease administration and enforcement of Washington's Family Leave Act except in two areas where the state law provides additional benefits to the FMLA. Under the Human Rights Commission laws against discrimination (Chapter 49.60 RCW), protected leave for disability due to pregnancy or childbirth applies to employers of 8 or more employees. For employers with **100 or more** employees, the following two provisions of the Family Leave Act, Chapter 49.78 RCW, apply:

- An eligible employee who takes leave for care of a newborn, adoption of a child under 6, or care of a terminally ill child under 18, has a right to be returned to a work place within 20 miles of the employee's work place when leave began. See RCW 49.78.070(1)(b) (An eligible "employee" is a person, other than an independent contractor who has worked for the employer at least an average of an average of 35 hours per week in the 12 months immediately preceding leave); and
- The leave allowed for disability due to pregnancy or childbirth under the state Human Rights Commission mentioned above, is *in addition to* FMLA leave to care for a newborn or for any other FMLA-qualifying reason. The leave for pregnancy disability is not concurrent with the FMLA leave; both are protected leave categories. See Administrative Policy ES.E.1 at www.lni.wa.gov/SCS/workstandards/policies/ese1.htm.

23. How do the Family Care rules relate to the federal FMLA?
The federal Family Medical and Leave Act (FMLA), which was signed into law in 1993, permits covered workers to take up to 12 weeks of **unpaid leave** to care for a newborn or newly adopted or foster child, to recover from the employee's own serious illness, or to care for a child, spouse, or parent with a serious health condition. To be eligible for leave under the FMLA, a worker must work for an employer with 50 or more employees, have worked at least 12 months for the employer, and have worked at least 1,250 hours. Also, under the FMLA, an employer has been permitted to deny an employee the use of sick leave while caring for a sick family member. However, under Chapter 296-130 WAC, Family Care rules, all employees with access to paid sick leave or other paid time off will now have the choice to use this leave while caring for sick family members (regardless of whether the leave is also covered by the FMLA). If leave taken under the Family Care rules qualifies for leave under the FMLA, employers may count the time as FMLA leave.

24. How do the Family Care rules differ from the federal FMLA?
Unlike the FMLA, these rules apply to all employers who provide paid leave benefits regardless of size, cover other family members (i.e., parent-in-law and grandparent) for use of paid leave not included under the FMLA requirements, and do not require illness of three consecutive days for its use.

25. Must the employer allow coverage under the federal FMLA for the additional family members now covered under the Family Care Act?
No.

26. Is the definition for "serious health condition" in the new rules the same as the one in the FMLA?
The definition for "serious health condition" in the new rules reflects a summary of the key points of the FMLA, including pregnancy. It was condensed to simplify the language since nearly 80 percent of employers in this state do not fall under the FMLA. Additionally, the scope of the

definition in the new rule is intended to be easier to understand and administer for all parties involved. It may also be more inclusive than the FMLA, thereby allowing coverage under more conditions. The legislation did not mandate that the definitions be identical to the FMLA.

27. Where can I get more information?
If you have questions about these rules please contact the Employment Standards Program staff either at your local L&I field service location or the central office Employment Standards Program at 360-902-5316. A complaint may be filed by completing a complaint form and sending it to the local L&I field service office.

For more information about the FMLA, call the U.S. Department of Labor at 1-866-487-9243 or see www.dol.gov/esa/regs/compliance/whd/whdfs28.htm.

For more information about discrimination issues regarding disability due to pregnancy or childbirth, contact the Human Rights Commission at 1-800-233-3247.